Supreme Court, U.S.
FILED
MAY 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1760

In the Supreme Court of the United States

October Term, 1988

M. THORA WORRELL,
Petitioner,

vs.

THE B.F.GOODRICH COMPANY,
a corporation,
Respondent.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM GAUS
KEVIN M. FONG
Counsel of Record
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
Telephone: (415) 983-1000
Counsel for Respondent

PILLSBURY, MADISON & SUTRO
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
Of Counsel

2608

STATEMENT REQUIRED BY SUPREME COURT RULE 28.1

Respondent The B.F.Goodrich Company has no parent company. In addition to wholly owned subsidiaries, respondent has ownership interests, either directly or through wholly owned subsidiaries, in B.F.Goodrich Chemical d Venezuela C.A. and Japan Power Brake, Inc.

TABLE OF CONTENTS

	Page
Preliminary statement	1
Statement of the case	3
Argument	7
I. The petition is untimely.....	7
II. In any event, respondent timely filed its motion to dismiss in the district court, and the district court properly denied petitioner's request for entry of a default judgment	10
III. Petitioner did not raise any other issues before the Court of Appeals	13
Conclusion	16

TABLE OF AUTHORITIES

	Page(s)
Cases	
Adickes v. Kress & Co., 398 U.S. 144	14-15
Blair v. Zimmerman, No. 86-7037 (E.D.Pa. Mar. 31, 1987), 1987 Westlaw 8826	12-13
Dept. of Banking v. Pink, 317 U.S. 264	9
Madden v. Cleland, 105 F.R.D. 520	12, 13
Rust v. Kansas City, 107 F.R.D. 370	12
Worrell v. B.F.Goodrich Co., 454 U.S. 969	3
Statute	
United States Code	
Title 42, section 2000e	3
Rules	
Federal Rules of Civil Procedure	
Rule 4(c)(2)(C)(ii)	2, passim

Rule 12(a) ..... 2, passim

United States Supreme Court Rules

Rule 20.4 ..... 7, 8

No. 88-1760

In the Supreme Court of the United States

October Term, 1988

M. THORA WORRELL,
Petitioner,

vs.

THE B.F.GOODRICH COMPANY,
a corporation,
Respondent.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The petition is untimely. The Court of Appeals denied rehearing on May 26, 1988, and the time for filing a petition for writ of certiorari expired ninety days later, on August 24, 1988.

The petition was not filed until March 15, 1989.

In any event, the decision of the Court of Appeals was correct. The twenty-day response time provided by Rule 12(a) commences when service of process is effective under Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure--that is, on the date the acknowledgment is served. Respondent timely filed its motion to dismiss in the district court, and the district court properly denied petitioner's request for entry of a default judgment.

Petitioner did not raise before the Court of Appeals the numerous other issues that petitioner attempts to raise in her petition. None of those issues are appropriate for review by this Court.

STATEMENT OF THE CASE

Petitioner M. Thora Worrell filed an action alleging sex and race discrimination under Title VII, 42 U.S.C. § 2000e, in the United States District Court for the Northern District of Ohio on May 19, 1978 (Clerk's Record on Appeal (9th Cir.) (hereinafter "CR"), item 8, p. 2). Judgment was entered for B.F.Goodrich on May 16, 1979 (CR 8, p. 2). The United States Court of Appeals for the Sixth Circuit affirmed the district court's decision on May 5, 1981, and plaintiff's petition for rehearing was denied on June 16, 1981 (CR 8, p. 2). This Court denied certiorari on November 2, 1981 (CR 8, p. 2; Worrell v. B. F. Goodrich Co., 454 U.S. 969 (1981), and on January 18, 1982, this Court denied petitioner's

motion for leave to file a petition for rehearing (CR 8, p. 2).

On May 8, 1986, petitioner filed an "amended complaint" for relief from judgment in the United States Court for the Northern District of California, asserting fraud (CR 8). Petitioner mailed the amended complaint to respondent on May 27, 1986, pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure (Appellant's Brief (9th Cir.) July 21, 1987, p. 4).

Respondent signed an Acknowledgement of Receipt of Summons and Complaint on June 13, 1986 (CR 14) and mailed that form to petitioner. Petitioner received the acknowledgment on June 14 and filed it with the district court on June 16, 1986 (CR 15).

On July 3, 1986, respondent filed a motion to dismiss or, in the alternative, motion for summary judgment (CR 19, 20). The district court granted respondent's motion to dismiss (CR 56). The district court ruled that petitioner had raised the issue of fraud in her appeal to the Sixth Circuit and, therefore, her claim of fraud in the instant action was barred by res judicata (Pet.Appx., pp. A-12 to A-13). In addition, the district court ruled that petitioner had waited seven years from the "discovery" of the alleged fraud and dismissed plaintiff's action as untimely (Pet.Appx., p. A-12).

In the meantime, petitioner had twice sought default judgments, claiming that respondent had failed to file its responsive pleading to her complaint

(i.e., its motion to dismiss) within the twenty-day period provided by Rule 12(a) of the Federal Rules of Civil Procedure (Pet.Appx., pp. A-4 to A-5). The district court clerk refused to enter default judgments, since the twenty-day response time provided by Rule 12(a), when measured from the date respondent's attorney signed the acknowledgment, had not expired (Pet.Appx., p. A-5).

Petitioner appealed, arguing only that the district court clerk should have entered a default judgment against respondent. The Court of Appeals affirmed (845 F.2d 840), holding that "service of process is effective under Rule 4(c)(2)(C)(ii) on the date the acknowledgment is signed (if timely returned) and the twenty-day response time provided by Rule 12(a) commences on

that date" (Pet.Appx., p. A-7). The Court of Appeals concluded that petitioner's "request for a default judgment was therefore premature and properly denied by the court" (Pet.Appx., pp. A-7 to A-8). On May 26, 1988, the Court of Appeals denied a petition for rehearing (Order (9th Cir.), May 26, 1988; Appendix hereto, p. 1).

ARGUMENT

I. THE PETITION IS UNTIMELY.

The petition is untimely. Rule 20.4 of this Court provides that "if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the

date of the denial of rehearing or of the entry of a subsequent judgment entered on rehearing" (Supreme Court Rules, Rule 20.4).

Here, the Court of Appeals denied rehearing on May 26, 1988 (Order (9th Cir.), May 26, 1988; Appendix hereto, p. 1). Therefore, the petition for writ of certiorari was due ninety days from May 26, 1988--that is, on August 24, 1988. In fact, the petition was not filed with this Court[1] until March 15, 1989.[2] The petition was filed

---

1 Petitioner attempted to file with the Court of Appeals a "Notice of Appeal to the United States Supreme Court for Writ of Certiorari" on January 14, 1989.

2 As noted by petitioner, the petition was initially returned to petitioner by the clerk of this Court and resubmitted by petitioner on April 22, 1989 (Pet., p. 16).

more than six months after the time for filing had expired.[3]

---

3 Following the May 26, 1988 denial of rehearing, petitioner filed a number of collateral motions in the Court of Appeals. The Court of Appeals denied all such motions -- for example, on November 14, 1988 denying a motion for reconsideration of orders denying recall of mandate and recusal of the panel (Appendix hereto, p. 2) and on December 15, 1988 denying a motion to vacate the November 14, 1988 order (Appendix hereto, pp. 3-4). Neither order affected the time within which to apply for certiorari (Dept. of Banking v. Pink, 317 U.S. 264, 266 (1942) ("Unlike a motion for reargument or rehearing, it did not seek to have the Court of Appeals reconsider any question decided in the case")).

II. IN ANY EVENT, RESPONDENT TIMELY FILED ITS MOTION TO DISMISS IN THE DISTRICT COURT, AND THE DISTRICT COURT PROPERLY DENIED PETITIONER'S REQUEST FOR ENTRY OF A DEFAULT JUDGMENT.

In any event, the decision of the Court of Appeals was correct. Respondent filed its responsive pleading in the district court within the twenty-day time period under Rule 12(a) of the Federal Rules of Civil Procedure. Petitioner had mailed the summons and amended complaint to petitioner by certified mail. Respondent signed the acknowledgment of receipt and timely returned that form to petitioner. Thereafter, respondent filed a motion to dismiss within twenty days from the date the acknowledgment form was executed.

The Court of Appeals correctly held that the twenty-day response time provided by Rule 12(a) commences when service of process is effective under Rule 4(c)(2)(C)(ii)--that is, on the date the acknowledgment is signed (Pet.Appx., p. A-7).[4] The service under Rule

---

4 Rule 4(c)(2)(C)(ii) provides that a summons and complaint may be served

> "by mailing a copy of the summons and of the complaint (by first-class mail, postage pre-paid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made [by a person not a party or by the United States marshal]" (Fed.Rules Civ.Proc., Rule 4(c)(2)(C)(ii)).

4(c)(2)(C)(ii) is not deemed complete until the signed acknowledgment is timely returned; accordingly, the twenty-day response period under Rule 12(a) does not begin until the acknowledgment is made (Pet.Appx., p. A-7).[5] Every other court that has considered this issue has similarly concluded that the period for a defendant's answer or motion to dismiss is measured from the date the defendant executed the acknowledgment form (e.g., Rust v. Kansas City, 107 F.R.D. 370, 371 (N.D.Mo. 1985); Madden v. Cleland, 105 F.R.D. 520, 525 (N.D.Ga. 1985); Blair v. Zimmerman, No. 86-7037 (E.D.Pa.

---

5 Petitioner's argument (Pet., pp. 38-48) fails to recognize that her attempt to serve by mail was not effective unless and until the acknowledgment of receipt form was executed.

Mar. 31, 1987), 1987 Westlaw 8826).[6] There is no need for review by this Court.

III. PETITIONER DID NOT RAISE ANY OTHER ISSUES BEFORE THE COURT OF APPEALS.

Petitioner did not raise any other issues before the Court of Appeals.

---

6 Under plaintiff's interpretation of Rule 4(c)(2)(C)(ii), a defendant would be encouraged to refuse to sign the acknowledgment of receipt--thereby forcing the plaintiff to use alternative methods of service (Fed.Rules Civ.Proc., Rule 4(c)(2)(A) and (B)) and gaining additional time to respond to the complaint (Madden v. Cleland (N.D.Ga. 1985) 105 F.R.D. 520, 524 ("With that choice * * *, few parties would decide to sign the acknowledgement form")). Plaintiff's argument would frustrate the purpose of Rule 4(c)(2)(C)(ii), and has been universally rejected by the courts.

Petitioner's brief to the Court of Appeals focused exclusively on the issue of whether respondent had filed a timely motion to dismiss and whether the district court should have entered a default judgment (see Appellant's Brief (9th Cir.) July 21, 1987). According to petitioner, the "Question Presented" was "[w]hether the district court clerk may refuse to perform his ministerial and peremptory duty to enter default judgment against defendant * * *" (Appellant's Brief (9th Cir.) July 21, 1987, p. 2).

Petitioner did not raise before the Court of Appeals the numerous other issues that petitioner attempts to present in her petition. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them" (Adickes v.

Kress & Co., 398 U.S. 144, 147, n. 2 (1970); accord, Delta Airlines, Inc. v. August, 450 U.S. 346, 362 (1981)). There are no extraordinary issues requiring review by this Court.[7]

---

7 The district court's opinion summarizes the reasons for dismissal of petitioner's claims (see Pet.Appx., pp. A-11 to A-13).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM GAUS
KEVIN M. FONG
Counsel of Record

Counsel for Respondent

PILLSBURY, MADISON & SUTRO

Of Counsel

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

M. THORA WORRELL,	)	
	)	
Plaintiff/Appellant,	)	No. 86-2788
	)	
vs.	)	D.C. No.
	)	CV-86-20233-SW
B.F. GOODRICH COMPANY,	)	
	)	ORDER
Defendant/Appellee.	)	
	)	

On Appeal from the United States
District Court for the
Northern District of California
Spencer M. Williams,
District Judge, Presiding

Before: SKOPIL, SCHROEDER, and ALARCON,

Circuit Judges

Appellant's petition for rehearing is DENIED. Her motion to compel the district court to retrieve the record in this case is also DENIED.

[Filed May 26, 1988, Cathy A. Catterson, Clerk, U.S. Court of Appeals.]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

M. THORA WORRELL,	)	
	)	
Plaintiff/Appellant,	)	No. 86-2788
	)	
vs.	)	D.C. No.
	)	CV-86-20233-SW
B.F. GOODRICH COMPANY,	)	
	)	ORDER
Defendant/Appellee.	)	
	)	

On Appeal from the United States
District Court for the
Northern District of California
Spencer M. Williams,
District Judge, Presiding

SKOPIL, Circuit Judge

Appellant's "Motion of Inquiry," construed as a motion for reconsideration of the various orders denying recall of the mandate and recusal of the panel is DENIED.

[Filed Nov. 14, 1988, Cathy A. Catterson, Clerk, U.S. Court of Appeals.]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

M. THORA WORRELL,	)	
	)	
Plaintiff/Appellant,	)	No. 86-2788
	)	
vs.	)	D.C. No.
	)	CV-86-20233-SW
B.F. GOODRICH COMPANY,	)	
	)	ORDER
Defendant/Appellee.	)	
	)	

On Appeal from the United States
District Court for the
Northern District of California
Spencer M. Williams,
District Judge, Presiding

SKOPIL, Circuit Judge

Appellant's motion to vacate the court's order of November 14, 1988 is DENIED. The clerk of the court is directed to close this case and to reject

the filing of any additional motions by the appellant.

[Filed Dec. 15, 1988, Cathy A. Catterson, Clerk, U.S. Court of Appeals.]